Immunocept, LLC, et al v. Fulbright & Jaworski Doc. 11

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**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

**IMMUNOCEPT, LLC, PATRICE ANNE LEE, and JAMES REESE MATSON,
Plaintiffs,**

-vs- **Case No. A-05-CA-334-SS**

**FULBRIGHT & JAWORSKI, LLP,
Defendant.**

ORDER

BE IT REMEMBERED on the 4th day of May 2006, the Court reviewed the file in the above-styled cause, and specifically, Plaintiffs' Motion to Alter or Amend the Judgment [#109]. Having considered the motion and accompanying appendix, the response, the reply, the relevant law, and the case file as a whole, the Court now enters the following opinion and orders.

Background

Plaintiffs filed their original complaint in this case on May 6, 2005, and thereafter filed a first amended complaint on May 31, 2005. In that pleading, Plaintiff Immunocept, LLC ("Immunocept") alleges it is the owner of intellectual property rights, including Patent No. 5,571,418 ("the '418 patent"), concerning a medical device for the treatment of sepsis and septic shock in medical patients. First Am. Compl. ¶ 7. Immunocept obtained its interest in the intellectual property, along with "all ancillary rights and claims," pursuant to an assignment made by the original inventors—Patrice Anne Lee, Robert Wilton Prior, and James Reese Matson (collectively, "the Inventors"). Lee and Matson are also Plaintiffs in this suit. *Id.* ¶¶ 2–3.

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Plaintiffs allege that in 1993, after successfully developing and testing their sepsis treatment device, which they refer to as a "large pore hemofilter," the Inventors sought the assistance of Defendant Fulbright & Jaworski, LLP ("Fulbright") to assist them in securing a patent for the device. *Id.* ¶ 12. According to Plaintiffs, the Inventors relied on Fulbright's expertise "to draft them a patent that would provide their invention with the broadest possible protection against infringement, and that would be relied on by potential industry and financial partners as being an effective patent." *Id.* The '418 patent was issued by the United States Patent and Trademark Office on November 5, 1996. *Id.*

Some time later, Plaintiffs were approached by Therakos, Inc. ("Therakos"), a subsidiary of Johnson & Johnson ("J&J"), in connection with the possible commercialization of their invention. *Id.* ¶¶ 14–15. Therakos engaged in extensive due diligence, and eventually, told Plaintiffs it was interested in meeting with them to "talk about structuring a deal." *Id.* ¶ 16. However, on April 15, 2002, Therakos informed Plaintiffs it was no longer interested in pursuing these discussions. According to Therakos, J&J's patent lawyers had reviewed the '418 patent and determined it was so poorly drafted[1] that it provided no real protection from copy-cat devices and methods. *Id.* ¶¶ 17–18. In the opinion of the J&J lawyers, "the patent was virtually worthless." *Id.* ¶ 18.

Plaintiffs allege Fulbright committed legal malpractice in prosecuting the '418 patent, which has caused "reasonable industry and financial partners [to] refuse to become involved with Plaintiffs in commercializing the invention." *Id.* ¶ 19. Accordingly, Plaintiffs contend they have suffered "lost profits, lost royalties, loss of time and money expended, and other remedial costs." *Id.*

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[1] The basis of this allegation is that Fulbright attorney Sarah Brashears "amended the original claim language to include the restrictive transitional phrase 'consisting of' instead of the open 'comprising' transitional phrase." Pls.' Mot. Part. Summ. J. at 2.

On March 24, 2006, the Court granted summary judgment in favor of Defendant Fulbright on two independent grounds: (1) Plaintiffs' claims are barred by limitations; and (2) Plaintiffs' damages are too speculative to support their claims under Texas law. Plaintiffs request that the Court alter or amend its judgment on the grounds that the Court committed manifest factual and legal errors in entering summary judgment against them. *See Templet v. HydroChem Inc.*, 367 F.3d 473, 478–79 (5th Cir. 2004) ("Rule 59(e) 'serve[s] the narrow purpose of allowing a party to correct manifest errors of law or fact or to present newly discovered evidence.'") (quoting *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 473 (5th Cir.1989)).

Discussion

I. Limitations

The Court granted summary judgment in favor of Fulbright on limitations grounds. As the Court explained in the order granting summary judgment, because Plaintiffs discovered or should have discovered through the exercise of reasonable care and diligence the facts establishing their claim on or before March 9, 2002, their claims are barred as a matter of law.

Specifically, the Court noted that by February 28, 2002, Plaintiffs' later-retained patent attorney, Thomas Felger of Baker Botts, had reviewed both the '418 patent and the file history in connection with his efforts to "develop a picket fence around the '418 patent." Def.'s Mot. Summ. J., Ex. R, Ex. S at 20–21, 28, 32, 37–38.

As Plaintiffs have repeatedly made clear, the crux of this lawsuit is Plaintiffs' theory that the use of the phrase "consisting of" rather than "comprising" in the claims of their patent had the effect of severely narrowing the patent's scope, and that the difference in the meaning between these two phrases is so obvious that any patent attorney of ordinary skill would immediately spot the difference. *See, e.g.*, Reply Br. Supp. Pls.' Mot. Part. Summ. J. at 1 ("This case arises from a classic blunder in patent law. An unsupervised junior attorney amended the claims of Immunocept's patent to insert the phrase 'consisting of' (where a competent patent attorney, aware of the enormous difference in meaning, would have used 'comprising')."). Indeed, Plaintiffs' supplemental evidence shows, "[a] reasonable patent attorney discovering this term ["consisting of"] in a patent's claim language would recognize that it had the effect of significantly narrowing the scope of the patent." Notice Supp. Pls.' Mot. Alter Amend J., Ex. 1 ¶ 4 ("MacPherson Aff.").

Moreover, as Plaintiffs have conceded, "knowledge acquired by or notice to an attorney during the existence of the attorney-client relationship, and while the attorney is acting within the scope of his authority, is imputed to the client." *Burke v. Ins. Auto Auctions Corp.*, 169 S.W.3d 771, 777–78 (Tex. App.–Dallas 2005, pet. denied). Plaintiffs have not argued that Felger was not or should not have been aware that the scope of Plaintiffs' patent was severely limited by the use of the "consisting of" language.[2] Because Felger's awareness of the patent's limited scope was imputed to Plaintiffs, they were on notice at the time of his review of the patent and file history that they did not in fact possess what they allege Fulbright had agreed to provide—a "patent that would provide their invention with the broadest possible protection against infringement, and that would be relied on by potential industry and financial partners as being an effective patent." First Am. Compl. ¶ 12.

In arguing the Court committed manifest errors in rendering summary judgment against them on limitations grounds, Plaintiffs insist the Court pulled statements from their expert's deposition testimony out of context, ignored conflicting testimony from Fulbright's witnesses, and, in essence, concluded that Plaintiffs' patent counsel Felger committed malpractice as a matter of law by failing to inform them of Fulbright's malpractice. Plaintiffs also insist the Court "failed to recognize that there is a genuine issue of material fact concerning the scope of Felger's employment." Pls.' Mot. Alter Amend J. at 3.

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[2] In its order granting summary judgment, the Court noted "Plaintiffs have resisted discovery about what Felger's actual impressions about the 'consisting of' language were." Order of Mar. 24, 2006 at 8 n.3. Nonetheless, in granting summary judgment, "the Court assume[d], based on MacPherson's testimony concerning the obviousness of the phrase's inherent limitations, that Felger understood the scope of the patent upon reviewing it." *Id.* Nothing in Plaintiffs' Motion to Alter or Amend the Judgment suggests that the Court's assumption was a faulty one.

Each of Plaintiffs' arguments is grounded in a fundamental misunderstanding of the basis of the Court's summary judgment ruling. The Court has not assumed, despite Plaintiffs' insistence to the contrary, that Felger was actually aware of all of the facts comprising Plaintiffs' malpractice claim. Nor has the Court assumed that MacPherson's testimony was that Felger should have been aware of the existence of the malpractice claim. As Plaintiffs point out, there is plenty of testimony in the record that an attorney would need to know more than the fact that the phrase "consisting of" had been used in the patent to conclude malpractice had occurred.

Nonetheless, as the Court has already indicated, the fact that Felger was likely unaware of all of the facts necessary to support Plaintiffs' malpractice claims is "beside the point." Order of Mar. 24, 2006 at 7. What is uncontroverted, and what MacPherson's new affidavit continues to make clear, is that "[a] reasonable patent attorney discovering this term in a patent's claim language would recognize that it had the effect of significantly narrowing the scope of the patent." MacPherson Aff. ¶ 4. Regardless of the possibly limited scope of Felger's duties, there is no question he reviewed both the patent and the file history, and Plaintiffs have put forth no argument that he would not have been aware that the patent was a limited patent. Under Texas law, Felger's awareness was imputed to Plaintiffs. This imputed awareness of the patent's limitations, when coupled with Plaintiffs' actual awareness that they had intended to get the broadest patent possible, was sufficient to trigger the limitations period. *Cf. Carter v. Converse*, 550 S.W.2d 322, 329 (Tex. Civ. App–Tyler 1977, writ ref'd n.r.e.) (holding, in the context of a real estate transaction, that the combined knowledge of a party and her attorney was the standard for determining the party's "knowledge of facts which would have put them on further inquiry"). As the Court made clear in its order granting summary judgment:

> Plaintiffs cannot colorably argue they were not on notice of their injury until they knew the specific details of their malpractice case. Indeed, the law does not require that Plaintiffs actually know all of the facts establishing their cause of action before limitations will begin to run. Instead, limitations will begin running when they "should have discovered through the exercise of reasonable care and diligence the facts establishing the elements of a cause of action." *Apex*, 41 S.W.3d at 120–21. As Fulbright points out, this occurs when Plaintiffs "discover[ed] a risk of harm to [their] economic interests." *Brents*, 53 S.W.3d at 914–15.

Order of Mar. 24, 2006 at 7. Once Plaintiffs gained the imputed knowledge that the patent they got was nothing like the patent they intended to get, they had sufficient constructive knowledge that they should have discovered through the exercise of reasonable care and diligence the facts establishing the elements of their cause of action. Accordingly, the Court holds there was no manifest error of law or fact in the Court's conclusions with respect to limitations.

II. Speculative Damages

Next, Plaintiffs argue that the Court's summary judgment conclusions with respect to the speculative nature of its damages were erroneous because the Court incorrectly assumed Plaintiffs were seeking "lost profit" damages, rather than damages for the diminution in the value of their patent. Initially, the Court notes this position is directly contradicted by Plaintiffs' own pleadings. *Compare* Pls.' Mot. Alter Amend J. at 3 ("Plaintiffs are not seeking lost profit damages . . .") *with* First Am. Compl. ¶ 19 ("Plaintiffs have suffered damages, including *lost profits*, lost royalties, loss of time and money expended, and other remedial costs.") (emphasis added). More importantly, Plaintiffs' have cited no authority for the proposition that damages arising out of a patent should be treated any differently than any other speculative business would be treated under Texas law. Although Plaintiffs' expert has suggested that he is attempting to place a value on the patent itself, Plaintiffs cannot deny that the methods he uses in assessing that value involve the same exercises in speculation decried by Texas courts in lost profits cases.

In any event, Plaintiffs' argument that the Court should have looked to patent valuation cases in evaluating damages, as well as their remaining arguments that their damages model was sufficiently non-speculative to support an award in this case, were all clearly before the Court when the summary judgment order was entered. A Rule 59(e) motion is "not the proper vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment." *Templet*, 367 F.3d at 479. Because the Court considered these arguments and rejected them in granting summary judgment, the Court declines to further consider them here.

Conclusion

In accordance with the foregoing:

IT IS ORDERED that Plaintiffs' Motion to Alter or Amend the Judgment [#109] is DENIED.

SIGNED this the 4th day of May 2006.

Sam Sparks

SAM SPARKS
UNITED STATES DISTRICT JUDGE